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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EARL GALES et al.,

Plaintiffs and Respondents.

v.

DEREK F.C. ELLIOTT et al.,

Defendants and Appellants.

B288925

(Los Angeles County
Super. Ct. No. BC410971)

APPEAL from a judgment of the Superior Court of
Los Angeles, Holly E. Kendig, Judge. Affirmed.

Law Offices of Todd B. Rhoads and Todd B. Rhoads for
Defendants and Appellants.

Robert C. Pearman for Plaintiffs and Respondents.

Defendants Derek F.C. Elliott (Derek Elliott) and Frederick Elliott (collectively, the Elliotts) appeal from a judgment in favor of plaintiffs and respondents Earl Gales and Jenkins, Gales & Martinez, Inc. (collectively, plaintiffs). The Elliotts argue the trial court erred in denying their motion to dismiss the complaint after plaintiffs failed to bring the case to trial within five years as required by Code of Civil Procedure section 583.310. The Elliotts also assert the trial court erred in not staying the civil proceedings pending resolution of parallel criminal proceedings against Derek Elliott.

We conclude the trial court did not abuse its discretion in excluding from the five-year calculation the nearly four-year period in which the Elliotts were in default, and properly denied the Elliotts' motion to dismiss on that basis. We further conclude the trial court did not abuse its discretion in denying the Elliotts' motion for a stay, which the Elliotts did not file until two weeks before trial, despite the criminal proceedings having been ongoing for more than five years. Moreover, the motion lacked any specific information about the criminal proceeding from which the trial court could determine the extent to which the civil proceeding might implicate Derek Elliott's privilege against self-incrimination. Accordingly, we affirm the judgment.

PROCEDURAL BACKGROUND

The following summary is limited to the procedural history relevant to resolving this appeal.

1. Plaintiffs' complaint and the Elliotts' default

On April 1, 2009, plaintiffs filed a complaint against the Elliotts, James Catledge, and more than 20 other individual and entity defendants. The complaint alleged that Derek Elliott

controlled some of the entity defendants, referred to collectively in the complaint as “the Elliott Group.” (Some capitalization omitted.) The complaint alleged that Frederick Elliott, Derek’s father, is or was an officer or director of the Elliott Group. Catledge allegedly controlled several of the other entity defendants.

Plaintiffs alleged 16 causes of action, including breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation, arising from a real estate project in the Dominican Republic involving the Elliotts and Catledge in which plaintiff Gales allegedly invested and to which plaintiff Jenkins, Gales & Martinez, Inc. allegedly contributed architectural and other services. Plaintiffs filed their First Amended Complaint on June 26, 2009, which, among other things, added additional defendants and causes of action.

When the Elliotts did not file an answer or otherwise respond to the complaint, the clerk of the superior court entered default against the Elliotts at plaintiffs’ request on December 10, 2009. The trial court docket indicates that over the next two years plaintiffs reached settlements and/or dismissed their claims against other defendants.

Plaintiffs informed the trial court during a March 14, 2011 hearing that they intended to seek a default judgment against the Elliotts, and the trial court set a civil default prove-up hearing for June 8, 2011. At plaintiffs’ request, the trial court later continued the prove-up hearing to July 18, 2011 to coincide with the scheduled jury trial for some of the answering defendants, including Catledge. The trial court subsequently continued the trial and prove-up hearing to August 22, 2011 to provide more time for the parties to settle.

At the final status conference before the August 22 trial, plaintiffs informed the trial court that they had reached a settlement with Catledge and entities with which he was affiliated. The trial court stated that it “w[ould] not grant a judgment against the defaulted defendants until the complaint ha[d] been dismissed as to the answering defendants.” The trial court continued the prove-up hearing, setting it for the same day as an order to show cause regarding dismissal of the claims against Catledge and affiliated entities pursuant to settlement.

The trial court dismissed plaintiffs’ claims against Catledge and affiliated entities on January 27, 2012. The trial court held the prove-up hearing on February 6, 2012 and entered default judgment against the Elliotts on that date.

On September 18, 2012, federal prosecutors indicted Derek Elliott and Catledge for mail fraud and conspiracy to commit mail fraud arising from their activities related to the real estate project underlying plaintiffs’ civil suit.

On September 30, 2013, on the Elliotts’ motion, the trial court set aside the default judgment for improper service of process. Plaintiffs re-served the Elliotts on February 12, 2014. The trial court denied the Elliotts’ motion to quash service of summons. The record does not indicate that the Elliotts ever filed an answer to the complaint.

On August 27, 2014, Derek Elliott entered a plea agreement in the federal criminal matter, pleading guilty to conspiracy to commit mail fraud.

2. The Elliotts’ motion to dismiss

On July 28, 2016, the Elliotts moved to dismiss plaintiffs’ complaint for failure to bring the action to trial within five years as required by Code of Civil Procedure section 583.310. Plaintiffs

filed an opposition arguing, among other things, that the trial court should exclude from the five-year period the time in which the Elliotts were in default between December 10, 2009 and September 30, 2013. Plaintiffs asserted that during that time “it was impossible, impracticable, or futile to obtain judgment,” because the trial court had advised them “more than once . . . that no judgment could be pursued against the defaulted defendants” until the claims against the other defendants had been resolved. Plaintiffs cited the trial court’s earlier statement that it “w[ould] not grant a judgment against the defaulted defendants until the complaint ha[d] been dismissed as to the answering defendants.”

The trial court denied the Elliotts’ motion on February 7, 2017, concluding “that the time period between December 10, 2009 and September 30, 2013 (a period of 1,390 days) must be excluded from the computation of time due to impracticability under [section] 583.340(c). This would extend the Five Year Statute cut-off to January 20, 2018.” The trial court set the final status conference for November 14, 2017 and set trial for November 27, 2017.

3. The Elliotts’ motion to stay proceedings

On November 13, 2017, the day before the final status conference, the Elliotts filed a motion requesting a trial continuance due to unavailability of counsel, whom the Elliotts claimed had taken ill and was unable to represent them. In that same motion, the Elliotts requested the trial court stay plaintiffs’ action “pending resolution of the criminal indictment against

Derek Elliott.” The motion stated that it was set for hearing in April 2018, months after the scheduled start of trial.¹

The motion stated that Derek Elliott’s plea agreement required him to testify against Catledge in the criminal proceeding, which he had not yet done, and that Frederick Elliott was “also a co-operating witness in the criminal case.” The Elliotts argued that the stay was “necessary to protect [Derek] Elliott’s Fifth Amendment rights in connection with the . . . criminal proceeding.” The Elliotts contended that “[d]ue to the overwhelming similarity between the civil complaints and the criminal charges brought against [Derek] Elliott, [Derek] Elliott will undoubtedly have to invoke his privilege against self-incrimination at the civil trial to prevent himself from being incriminated further in the criminal proceeding.” Invocation of this privilege, claimed the Elliotts, “would essentially prevent [Derek] Elliott from presenting a defense and unjustifiably relieve Plaintiffs from having to meet their burden of proof.”

The Elliotts argued that denying a stay would force Derek Elliott “to make the difficult choice of either defending his criminal trial or the civil trial.” The Elliotts also suggested that if Derek Elliott had to testify in the civil proceeding, Catledge “could gain an advantage against the [P]eople’s case by having prior access to the testimony to be offered by [Derek] Elliott at the criminal trial,” which might jeopardize Derek Elliott’s plea agreement.

¹ The trial court in a minute order stated that the hearing on the motion was set for May 2018, as did the caption page for Derek Elliott’s supporting declaration. This discrepancy is not relevant to our resolution of this appeal.

Derek Elliott submitted a declaration in support of the motion stating that (1) he had been criminally charged for the conduct underlying plaintiffs' suit; (2) he had entered into a plea agreement requiring him to testify against Catledge; (3) he had yet to testify or be sentenced in the criminal proceeding; and (4) "[t]he conduct, parties, facts, and evidence in the civil case before this court and in the criminal court are almost all identical." The declaration attached a stipulation continuing the sentencing hearing in the criminal case. The stipulation stated that Derek Elliott was expected to be a witness at Catledge's trial, and that the parties agreed it would be "expedient" to sentence Derek Elliott after Catledge's trial. The Elliotts did not include with their motion the federal indictment or plea agreement.

The trial court held the final status conference on November 14, 2017. The Elliotts did not appear. In a minute order, the trial court noted that the Elliotts "apparently are seeking by motion (set for May 2018), a substantial trial continuance in order to hire new counsel." The trial court stated that it could not continue the trial beyond January 2018 because of the five-year rule, and it appeared that the Elliotts had been aware for many months of the need for new counsel. The trial court nevertheless granted a continuance to January 4, 2018 to give the Elliotts more time to hire counsel. The minute order did not address the request to stay trial pending resolution of the criminal proceeding, and the record does not reflect the trial court otherwise ruled on that motion.

4. Trial and judgment

The trial proceeded on January 4, 2018. The Elliotts did not appear. The trial court entered judgment on multiple causes

of action in favor of plaintiffs and against the Elliotts jointly and severally. The trial court awarded plaintiff Gales damages and interest of \$2,090,383.95 and attorney fees and costs of \$406,237.65. The trial court awarded plaintiff Jenkins, Gales & Martinez, Inc. \$164,503.42 in damages and interest and costs of \$17,776.28.

The Elliotts timely appealed.

DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion By Excluding The Period Of Default From The Five-Year Calculation

Code of Civil Procedure² section 583.310 provides, “An action shall be brought to trial within five years after the action is commenced against the defendant.” When calculating the five-year period, however, courts must exclude any time in which “[b]ringing the action to trial . . . was impossible, impracticable, or futile.” (§ 583.340, subd. (c).) “The determination whether it was ‘impossible, impracticable, or futile’ to bring a case to trial within a given time period is generally fact specific, depending on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff’s exercise of reasonable diligence in overcoming those obstacles.” (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 438 (*Howard*).) We review a trial court’s determination to exclude time under section 583.340, subdivision (c) for abuse of discretion: “Reversible abuse exists only if there is no reasonable basis for the trial court’s action, so

² Further undesignated statutory citations are to the Code of Civil Procedure.

that the trial court's decision exceeds the bounds of reason.” (*Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1271.)

Here, the trial court concluded it was impracticable for plaintiffs to bring the case to trial from the period beginning with the clerk's entry of default against the Elliotts on December 10, 2009, to the trial court's setting aside the default and default judgment on September 30, 2013. The Elliotts claim the trial court abused its discretion in so ruling. We disagree.

“[A]lmost invariably,” courts should exclude from the five-year calculation the period in which “a default judgment has been entered in favor of the plaintiff, effectively bringing the litigation to a standstill.” (*Howard, supra*, 10 Cal.4th at p. 438.) Thus, the trial court correctly excluded the time between February 6, 2012, when it entered default judgment against the Elliotts, and September 30, 2013, when it vacated that judgment.

Courts should also exclude “a reasonable period of time between the defendant's default and the entry of the default judgment.” (*Howard, supra*, 10 Cal.4th at pp. 438–439.) What constitutes “a reasonable period of time” depends on the plaintiff's diligence in obtaining entry of the default judgment: “[T]he time between entry of a default and entry of a default judgment should be excluded from the five-year time to bring a case to trial if and only if the court finds that the plaintiff used due diligence to obtain entry of the judgment, and that in spite of such due diligence, it was impossible, impracticable, or futile to obtain a judgment.” (*Hughes v. Kimble* (1992) 5 Cal.App.4th 59, 71 (*Hughes*).)

Here, the trial court's order did not state its reasons for concluding that it was impracticable for plaintiffs to obtain a

default judgment against the Elliotts sooner than they did. It earlier stated on the record, however, that it would not enter default judgment against the Elliotts until plaintiffs had resolved their claims against the answering defendants and, consistent with that statement, entered default judgment approximately two weeks after dismissing the claims against Catledge and his affiliated entities.

We may assume the trial court, who was far more familiar with the complexities of that litigation than are we, concluded that it was impracticable to enter judgment against the Elliotts while claims were pending against the answering defendants.

Indeed, entering a default judgment under those circumstances could require unnecessarily duplicative proceedings (such as a prove-up hearing in addition to a trial) and could risk inconsistent outcomes among defendants, particularly if the answering defendants' affirmative defenses could exonerate the Elliotts. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 5:268, p. 5-70 [trial court may enter default judgment against one of several jointly and severally liable defendants only if the answering defendants' defenses do not involve the defaulting defendant].) While the Elliotts suggest the trial court had the discretion to render a default judgment against the Elliotts while allowing the claims against other defendants to proceed, they cite no authority that a trial court abuses its discretion by not doing so.

The Elliotts do not contend that plaintiffs were not diligent in obtaining Catledge's dismissal or the dismissals against the other defendants, thus clearing a path to obtain a default judgment. We therefore reject the Elliotts' position that plaintiffs

“waited for an extended period of time doing nothing” before requesting the trial court enter default judgment.

The Elliotts rely on *Hughes* to support their claim of abuse of discretion. That case is inapposite. In *Hughes*, the trial court dismissed an action against a single defendant under section 583.310 after the plaintiff failed to obtain a default judgment in the three years following the clerk’s entry of default. (*Hughes, supra*, 5 Cal.App.4th at pp. 62–63.) The Court of Appeal affirmed, rejecting the plaintiff’s argument that the trial court was required to exclude the entire period of default from the five-year period. (*Id.* at pp. 70–71.) The court held that the trial court had the discretion to determine whether it was impossible, impracticable, or futile to obtain a default judgment during that time. (*Ibid.*)

Hughes, which involved an action against a single defendant, is factually distinguishable from the litigation in this case, which involved more than 20 defendants. Moreover, *Hughes* affirmed that trial courts have the discretion to include or exclude the prejudgment period of default, discretion that the trial court did not abuse in this case.

B. The Trial Court Did Not Abuse Its Discretion By Denying A Stay Pending Resolution Of The Parallel Criminal Proceeding

The Elliotts argue the trial court erred in not staying the action until resolution of the criminal proceeding against Catledge in which Derek Elliott, who had already pleaded guilty, was to be a witness. The Elliotts contend that allowing the trial to proceed forced Derek Elliott to choose between defending himself in the civil action or asserting his privilege against self-incrimination. We reject this argument.

“[A] civil defendant does not have the absolute right to invoke the privilege against self-incrimination.” (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 305 (*Fuller*).) Thus, “[a] party or witness in a civil proceeding ‘may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it.’” (*Id.* at p. 306.)

“Courts recognize the dilemma faced by a defendant who must choose between defending the civil litigation by providing testimony that may be incriminating on the one hand, and losing the case by asserting the constitutional right and remaining silent, on the other hand.” (*Fuller, supra*, 87 Cal.App.4th at p. 306.) However, “ ‘ “[t]he fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter.” ’ ” (*Ibid.*) A civil defendant involved in a related criminal case has no constitutional right to special accommodations; instead, any accommodation “ ‘has been treated as within the province of a court’s discretion in seeking to assure the sound administration of justice.’ ” (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 882; see also *Fuller*, at p. 307 [accommodation of “a civil defendant who is exposed to a related criminal prosecution” “is usually made . . . ‘from the standpoint of fairness, not from any constitutional right’ ”].) Thus, we review the trial court’s denial of a stay for abuse of discretion. (*People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 951 (*Harris*).)

As an initial matter, the Elliotts contend that the trial court did not rule on their stay request at all, which they claim was an abuse of discretion. It is true that the trial court never expressly ruled on their stay request. The trial court was under no obligation to do so, however, because the motion was

untimely. The Elliotts noticed the motion for hearing months after the trial was to have concluded, and the record does not reflect that they made any effort to have it heard sooner. They did not appear at the final status conference or on the day of trial, thus forfeiting the opportunity to call their request to the trial court's attention before trial. The conclusion of trial rendered the motion moot, so to the extent the trial court failed to rule on the motion after trial, no prejudice flowed from the Elliotts' untimely stay request.

Arguably, however, the trial court did rule on the stay request, albeit implicitly. The Elliotts' motion included not just the stay request but also a request for a continuance to seek new counsel, and the trial court granted a short continuance in response to the latter request. By granting the continuance, the trial court may have intended implicitly to deny the stay request on the merits.

Assuming the trial court implicitly denied the stay request, it did not abuse its discretion in doing so. The trial court reasonably could have concluded that to stay the trial would have been unfair and contrary to the sound administration of justice. Federal prosecutors initiated criminal proceedings against Derek Elliott in September 2012, and he entered into a plea agreement in August 2014, yet it was not until November 2017, more than five years after the indictment, the day before the final status conference and two weeks before the scheduled trial, that the Elliotts moved to stay the civil case. The trial court was well within its discretion to deny the motion as a last-minute attempt to thwart the proceedings rather than a legitimate expression of concern that Derek Elliott's constitutional rights were in jeopardy.

The motion also was substantively deficient. In deciding whether to stay civil proceedings pending resolution of parallel criminal proceedings, as a threshold matter the trial court must determine “the extent to which Fifth Amendment rights are implicated” by the civil proceeding. (*Harris, supra*, 214 Cal.App.4th at p. 952.) This requires the trial court to engage in “ ‘a particularized inquiry’ ” of the issues the parties likely will explore at trial so the trial court may decide “ ‘whether or not the privilege [against self-incrimination] is well founded.’ ” (*Fuller, supra*, 87 Cal.App.4th at p. 305, italics omitted.)³

The Elliotts’ motion did not provide sufficient information for the trial court to have made this determination. The motion recited in a conclusory fashion that the issues in the criminal proceeding overlapped with those in the civil proceeding and Derek Elliott likely would need to assert his Fifth Amendment privilege. The motion, however, lacked any specific information

³ Upon determining that a civil proceeding implicates a defendant’s Fifth Amendment rights, courts consider the following factors when deciding whether to issue a stay: “(1) the interest of the party opposing the stay in proceeding expeditiously with the action, and the potential prejudice to the party opposing the stay of a delay; (2) the burden which any particular aspect of the proceedings may impose on the party seeking the stay; (3) the convenience to the court in management of its cases and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending cases.” (*Harris, supra*, 214 Cal.App.4th at p. 952.) Because we conclude *post* that the Elliotts’ motion failed to make the threshold showing that the civil proceeding implicated their Fifth Amendment rights, we do not address these additional factors.

about the criminal proceeding from which the trial court could have determined whether this was so. The Elliotts also did not provide with their motion the indictments or the plea agreement they claimed testifying in the civil proceeding would impact.⁴

We acknowledge *plaintiffs* provided the federal indictments and plea agreement to the trial court in a 2015 filing. The Elliotts, however, did not direct the trial court to that earlier filing, nor was it the trial court's burden to hunt for documents not included in the Elliotts' motion and then to divine to what extent they supported that motion. The Elliotts also failed to appear at the final status conference, thus forfeiting their pretrial opportunity to explain their position to the trial court, nor did they appear at trial to assert their Fifth Amendment rights regarding any particular questioning by plaintiffs. In the absence of specific information from which the trial court could have made the necessary particularized inquiry as to the applicability of the privilege against self-incrimination, the trial court did not abuse its discretion in denying the motion.

⁴ Frederick Elliott in fact was not indicted and, other than an unsupported statement in the motion that he was to testify against Catledge, there was no evidence that he was involved in the criminal proceeding. Thus, even assuming *arguendo* the motion had merit as to Derek Elliott, it failed to justify staying the proceedings as to Frederick Elliott.

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.